even Napoleonic imperialism accorded, viz: the opportunity for the review of official decisions by a proper administrative court.

Let one thing however be constantly borne in mind in the creation of these administrative courts. See to it that the positions on such courts command the services of men, who by their knowledge, ability and integrity are fitted for the exercise of the judicial function in the revision of the acts of the officials on which they are to pass. Unless care be taken in this matter, the institution of such courts, so far from having the beneficial effect which may well be anticipated from them, will but tend to bring the conception of judicial control over administrative officials into disrepute and to strengthen the trend toward arbitrary government.

DISCUSSION

BY PROFESSOR ERNST FREUND
University of Chicago

The thought of those interested in public administration seems at the present time to be mainly concerned with problems of efficiency. This is easy to understand. With the rapid expansion of governmental control over all kinds of important interests we have, on the whole, held fast to the self-governmental theory of administrative organization which is not productive of the highest degree of expert knowledge and skill. Moreover legislation in its experimental stages frequently fell short of granting adequate power or erred in the direction of excessive rigor; in either case with the effect that in the past attempts to carry out such legislative policies have more than once met with defeat in the courts.

It is, therefore, not unnatural that recent efforts should have been chiefly in the direction of strengthening administration action. The history of railroad legislation is conspicuous in this respect. A study of the debates in congress in connection with the rate act of 1906 leaves the impression that the main concern of the legislators was how to get rid of the right of court review, and its final indirect recognition appears as a grudging concession to constitutional necessities. Yet increased administrative powers call for increased safeguards against their abuses, and as long as there is the possibility of official error, partiality or excess of zeal, the protection of private

right is as important an object as the effectuation of some governmental policy.

It is well to bear in mind that this protection is the main concern of administrative law while the problem of efficiency viewed simply with reference to the social or economic end to be attained should rather be treated as the subject of administrative science. It would greatly aid the building up of a new and still somewhat unfamiliar branch of legal discipline like administrative law if its distinctive subject matter were clearly recognized and marked off.

An impatience with judicial interference, similar to that which has been experienced in this country, but due to somewhat different causes, led the statesmen of revolutionary France to apply the theory of the separation of powers in such a manner as to debar in principle (although the principle was not consistently carried out) courts from meddling with public administration. A substitute was furnished by the creation of a system of administrative jurisdictions which has found its way from France to other parts of continental Europe. Neither in England nor in this country was a similar constitutional issue ever raised, and what judicial relief there was against administrative action was given by the regular courts. A system of administrative courts, though lacking some guaranties of independence, is yet based upon a distinct recognition of the necessity of subjecting official action to a control of a judicial nature, and since it is the sole business of these courts to administer such control, there is every inducement for the development of this branch of the law. To the regular courts this control is a special and anomalous jurisdiction. There is no distinct theory of public law, the very name of which is unknown to common law terminology. Common law rights are made to yield to the prerogatives of the sovereign, and the whole system of relief is permeated by an ill defined discretion resting upon considerations of public policy. Our law is, therefore, far from affording an adequate or consistent system of remedies for the protection of private rights against the exercise of public powers.

There are three points especially in which that protection is imperfectly worked out and capable of improvement.

1. In the first place, there ought to be some definite principle as to the right to a review of administrative decisions. If we differentiate questions of expediency or discretion, questions of fact and questions of law, the law is tolerably clear as to the first and the third. A fair exercise of discretion must be removed from judicial control

unless the administration is to be thrown into the hands of the courts, and relief must be confined to cases of abuse. This is in accordance with the attitude of our courts corresponding, in that respect, to that of the courts of England, France, and Germany. Questions of law ought always to be judicially reviewable and on the whole, the courts have worked out the system of remedies in such a way as to recognize this right, although subject to certain quite anomalous and unjustifiable qualifications. Mainly, then, the uncertainty of our law relates to the right to review questions of fact. According to the later rulings of the federal supreme court, which seem also to apply to questions of law expressly committed by statute to administrative authorities, the courts will give relief if the administrative decision is obviously mistaken or constitutes an abuse of power, but not necessarily in other cases. The administrative finding is, therefore, treated much like the verdict of a jury. This seems not sufficient, for it does not secure to the private interest an independent judgment on the part of an impartial authority. All experience in governmental organization goes to show that there is no guarantee of impartiality where the primary purpose of the officer is to carry out some policy or accomplish some public end, and not to decide simply between conflicting claims. It is not so much a question of lack of independence as of incompatibility of functions. It is therefore, of less importance that the review should be entrusted to a regular court than that it should be entrusted to some authority, the primary or sole function of which it is to adjudicate claims. Germany seems to recognize judicial or quasi-judicial review of questions of fact as the general principle of administrative law. The recent recommendation of a separation of the judicial and the administrative functions of the interstate commerce commission is based upon the same principle. The principle ought to be given effect with regard to all administrative decisions, not necessarily by applying all technicalities of a judicial trial, but granting to the individual at least the essential elements of an impartial hearing.

2. In the second place, the system of specific administrative remedies should be simplified. Even where the differences between forms of action have otherwise been abrogated by the code system, the distinction between different extraordinary legal remedies remains as a needless feature of legal archaism. The province of each writ (mandamus, certiorari, quo warranto, etc.) is not only determined by considerations which are at present without real significance,

but the distinctions between the various writs are at some points meaningless and unintelligible, and now and then are responsible for a practical denial of justice. And above all there should be a revision of the whole question of equitable jurisdiction in the matter of administrative relief. The old doctrine that a court of equity will not meddle with matters of public power has broken down; in the federal courts there is in many cases no other form of relief available; the former doctrine now survives mainly to create confusion, uncertainty, and technical distinctions. There seems to be no good reason for not allowing an injunction where mandamus would be available. It would be still better if there were one simple form of stating a case for judicial determination wherever a right to judicial relief is justified on principle.

3. The third feature of the law, which is in an unsatisfactory condition, relates to the matter of compensatory relief. The traditional common law method, traceable to the thirteenth century, of testing the legality of administrative action, is by an action in tort against an officer. Subsequently this was supplemented by quasi-contractual actions. In this way disputed questions regarding assessments, seizures, etc., were determined, and the system was adopted for settlement of customs disputes in the United States and of administrative controversies of various kinds in the several states. No suit in tort was allowed against the crown, and this immunity of the sovereign was received as part of the common law in America and applied both to the commonwealths and to the general government.

Actions against municipalities are more freely entertained in this country than in England. But the liability in tort is regularly denied in cases in which the injury suffered is incidental to the performance of some delegated governmental function. In New York the distinction between proprietary and governmental functions is carried almost to the point of absurdity so that, for instance, a city is liable if a child is run over by a street cleaning cart, but not if run over by an ambulance. Where there is an error in the exercise of the city's police powers to the injury of an individual, he has no remedy against the city. It thus appears that where the illegal exercise of public power directly invades private rights, the only available remedy, as a rule, is an action against an officer. This is unsatisfactory, because it is unjust to the official who may have acted to the best of his ability in cases, perhaps of real doubt, and because it is unfair to the injured individual who, if successful, may find that he has a

judgment against a financially irresponsible officer. Moved by the injustice to the officer, who acted in good faith, courts have in a number of cases sought to deny the personal liability of the officer when he acted in a quasi-judicial capacity, with the result, of course, of taking even the theoretical remedy which was intended to protect the individual right.

The only satisfactory compensatory relief would be against the community: the city, the state, or the general government. Their non-liability is so commonly assumed as axiomatic that reasons for it are hardly discussed. Were the matter carefully examined it would perhaps appear that neither the danger of fraud nor the financial burden imposed would be as great as in the case of the liability of a city for defective sidewalks, which the courts have so generally recognized. The city of New York under its charter is held for the errors committed in its sanitary administration, an eminently just provision which has not proved to be unduly burdensome financially. In the federal administration, the action against the collector of customs was virtually made an action against the government by legal provision which made judgments recovered against the collector payable out of the public treasury, and now there is a statutory method of recovering excess duties paid, in which the officer is not even normally the party defendant.

On the whole, the principles of liability are much the same on the continent of Europe as they are in England and America, except that the state in its private or proprietary capacity is suable as fiscus. In Prussia the liability of the fiscus is recognized in some cases where valuable property rights are wrongfully destroyed or impaired by public action. And quite recently a law has been enacted in Prussia which establishes the liability of the state or municipality for every official default. This shows that the idea of a right to indemnity against a community is not altogether visionary or impracticable.

BY PROFESSOR F. J. GOODNOW
Columbia University

Professor Freund has alluded to the intricacies and technicalities of the New York law as to the extraordinary legal remedies which are the main means available in New York for exercising a control over the acts of administrative officers. I remember one case here in which a school teacher, I think it was, brought suit against the city

of New York to enforce some right. He went up to the court of appeals, our highest court, to find out that he ought to have sued the board of education instead of the city. He started another action against the board of education and followed that up to the court of appeals also, and learned that he ought to have asked for a *mandamus*. When he tried for a *mandamus* he was told he had been guilty of laches, or negligence, in not applying for it in the first instance and that the time within which he might by law ask for a *mandamus* had passed and that he thus had no remedy at all.

This episode is only another illustration of the extremely technical character of the system in existence in a number of our states by which individual rights may be protected and I may add that the courts do not look with favor upon the attempts of the legislature to make the remedies available more effective. Thus again in New York the legislature attempted by statute to enlarge the province of the writ of *certiorari* as the means for the judicial review of assessments for the purpose of taxation. A Law of 1880 provided that a court by *certiorari* could quash an assessment because it was illegal, excessive, or disproportionate in that a particular piece of property was assessed at a higher rate than other property on the same assessment roll. But our court of appeals has held that an assessment may not be quashed for disproportionality merely because the property is assessed at a higher rate than some other particular piece or pieces of property but only because it is assessed at a higher rate than the rate of assessment generally adopted by the assessors. As the ascertainment of that rate in the larger cities would involve practically an examination of the entire roll, which would be very expensive, the writ of *certiorari* as a remedy for the review of tax assessments is available only to the largest taxpayers, generally corporations.

But the technical character of these remedies is not the worst feature of the situation. It may be a hardship to be obliged to employ the most expensive legal talent in order to be sure that one is applying for the proper remedy. But it is a greater hardship to be practically deprived of all effective judicial remedies. And this is the situation in which the individual is placed in dealing with the government of the United States. As the federal courts are courts of enumerated jurisdiction, congress may by omitting to give them power or by positively excepting certain classes of cases from their jurisdiction, make it almost impossible for the individual to contest the legality or constitutionality of the action of federal administrative officers. This

has been apparently the policy to congress. When taken together with the tendency, exhibited by the supreme court in the cases referred to by Mr. Parker, to recognize in the hands of executive departments powers of final and conclusive determination it has produced the condition that the individual is all but remediless in dealing with the United States. For example almost the only way in which it is possible to test the constitutionality of a tax imposed by congress is to pay the tax under protest and sue to get it back. But how can one pay a stamp tax under protest? In a recent case in the Supreme court an individual wished to test the constitutionality of a stamp tax on deeds and mortgages. He bought the stamps, went to the collector and protested against affixing them to the instrument. The collector told him not to affix the stamps if he did not wish to, but as he was liable to a criminal penalty for not putting them on if the law were constitutional he preferred to put them on. The supreme court held his affixing of the stamps was a voluntary payment and that therefore he could not recover their value.

All these cases show that our system of protecting individual rights against administrative action is very ineffective and we can do no better than endeavor to beat it into the heads of the legal profession that notwithstanding our boasted protection of private rights in this country, those rights are as a matter of fact much less protected against administrative action than they are under the system of administrative courts in vogue upon the continent of Europe.